Supreme Court of the United States

OCTOBER TERM, 1944

No. 21

CAROLENE PRODUCTS COMPANY, a corporation, CHARLES HAUSER and WILLIAM H. HARTKE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONERS

SAMUEL H. KAUFMAN,
Attorney for Petitioners.

SAMUEL H. KAUFMAN,
CRAMPTON HARRIS,
GEORGE TROSK,
Of Counsel.

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POINT I.

Petitioners offered to prove that at the time of the passage of the Act, "Filled Milk" was a skim milk compound devoid of vitamins A and D; that no way was then known of introducing these vitamins into Filled Milk, and that it was because of this vitamin deficiency that Congress declared that Filled Milk was injurious to health and proscribed its shipment. Petitioners offered to prove, further, that since the passage of the Act, science discovered a way to introduce vitamins A and D into a skim milk compound; that this discovery is employed in the compounding of Carolene, with the result that Carolene contains as much vitamin A and more vitamin D than whole cow's milk, and is one of the ten most wholesome and nutritious foods in the human diet.

Such facts, if established, would have constituted a complete defense to the indictment: they would have shown that Carolene is not within the rationale of the Act and that if applied to Carolene, the Act would be unconstitutional.

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Petitioners were entitled to give such evidence, and the learned Court's refusal to receive or consider it constituted error highly prejudicial to petitioners 7

A. The evidence petitioners offered to introduce would have shown (1) that when Congress proscribed the shipment of "filled milk", the thing, and the only thing, it intended to proscribe was a skim milk compound, injurious to health because deficient in vitamins A and D; and (2) that Carolene is not such a compound; it is not deficient in vitamins A or D, and is not injurious to health, but, on the contrary, has these vitamins in as great, if not greater, a degree and with a constancy not found in milk, and is one of the most wholesome and nutritious food products known 8

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B. The spirit and intent of a statute, not its strict letter, govern the applicability of the statute to any given state of facts. It was, therefore, error for the learned Trial Court to refuse to receive the evidence offered by petitioners 18

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Since Carolene is a wholesome and beneficial food product, fairly labeled and sold on its merit, without fraud on the public, and having none of the

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nutritional deficiencies for which Congress prohibited the interstate shipment of "Filled Milk", the legislative prohibition, if held applicable to Carolene, would be unconstitutional 30

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Carolene is not within the Act unless it is "in imitation or semblance" of milk. The learned District Judge erred in holding that Carolene is "in * * * semblance" of milk merely because "it reacts to the human senses as milk would react".

The Act adopted verbatim the words "in imitation or semblance" from earlier State and Federal Statutes which had previously been construed by the courts. By these decisions it had been settled that a product is "in imitation or semblance" of another only if ingredients have been added to, or omitted from, the product for the purpose of making it simulate such other. In adopting the language of the earlier statutes, Congress must be deemed to have used the language in the sense in which the courts had previously construed it.

It is undisputed here that whatever resemblance exists between Carolene and milk is due to the inherent qualities and attributes of the necessary ingredients of the product, and not to the addition or omission of any ingredient for the purpose of bringing about a simulation.

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BRIEF FOR PETITIONERS

Preliminary Statement.

This case is brought to this Court by Writ of Certiorari (321 U. S. 760, Memoranda, April 3, 1944) to review a judgment of the Circuit Court of Appeals, Fourth Circuit (140 F. (2) 61), affirming a judgment of the United States District Court for the Northern District of West Virginia, rendered after trial before Hon. W. E. Baker, District Judge, without a jury (51 F. Supp. 675).

The judgment under review convicts the defendants of making eight interstate shipments during 1941 in violation of the so-called "Filled Milk Act" (42 Stat. at L. 1486, 21 U. S. C. 61). The defendants Charles Hauser and William H. Hartke were each sentenced to imprisonment for one year,* and placed on probation for an aggregate of two

* The aggregate sentence of imprisonment against the individual defendants was one year under the first two counts and six months on the third and fourth counts to run concurrently.

years after the expiration of their prison terms and each of the defendants was fined $1,000. on each of the eight counts in the indictment (R. pp. 53-60).

Jurisdiction.

The basis of jurisdiction is Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of the Case.

The Federal Filled Milk Act (hereinafter referred to as the "Act") prohibits the shipment in interstate and foreign commerce of "filled milk", under penalty of a fine of not more than $1,000. or imprisonment for not more than one year, or both.

The Act defines "filled milk" as

> "* * * any milk, cream or skimmed milk, * * * to which has been added, or which has been blended, or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream or skimmed milk, * * *."

Following the definition is a paragraph reading

> "It is declared that filled milk, as herein defined, is an adulterated article of food, injurious to the public health and its sale constitutes a fraud upon the public."

Each of the eight counts in the indictment charges an interstate shipment of "filled milk" into West Virginia. The products shipped were known as "Milnut", "Milnot" and "Carolene", but for present purposes there is no distinction among them, (R. 36, 89, 232) and for convenience we shall refer to the contents of all the shipments as "Carolene".

Government's Case.

Petitioners stipulated (1) that the shipments charged in the indictment were made by Carolene Products Company; (2) that the Government's chemists, if called, would testify (a) that they found in each sample of Carolene an oil or fat other than butter fat, namely, either coconut oil or cottonseed oil, blended or compounded with skimmed milk; (b) that the product, in their opinion, was virtually indistinguishable from evaporated milk in appearance, taste, color, odor and consistency, and (c) that the product was packed in the same style and size of container as that in which evaporated milk is customarily packaged (R. 31-35; 95; 99-101).

It was shown, in the course of the Government's case, that in the manufacture of Carolene, vitamins A and D are introduced into the compound and uniformly distributed by the process of homogenization, so that they are blended into the product and remain therein in constant and unvarying amounts.

The Government offered no proof that Carolene was not wholesome or nutritious, or that it was adulterated or injurious to public health, or that its sale constituted a fraud on the public.

Petitioners' Case.

Petitioners proved that Carolene is a compound consisting of pure pasteurized skim milk, pure refined cottonseed or coconut oil, and pure high potency fish liver oils containing vitamins A and D.

Under the most modern and sanitary conditions, the compound is evaporated and hermetically sealed in 14-1/2 ounce cans (13 fluid ounces) and then sterilized (R. 218-226).

The label prominently states the nature of the product, that it is "a compound of evaporated skimmed milk, cottonseed oil, and vitamins A and D in fish liver oil", and that it is "not evaporated milk or cream" (R. 17).

Petitioners called witnesses, eminent experts in the medical, biochemical and chemistry fields, and offered Government publications, to establish, among other things:

(1) In 1923, when the Act was adopted, "filled milk" was a compound in the production of which two of the constituents of cow's milk, vitamins A and D, were extracted, and no way was then known by which it was commercially possible to restore them;

(2) Because of this vitamin deficiency, Congress declared the product adulterated, injurious to public health, and a fraud on the public;

(3) A skim milk compound, rendered deleterious because of its vitamin A and D deficiency was the thing, and the only thing, Congress intended to proscribe in passing the Act; and

(4) Science has since discovered a method by which it is commercially possible to introduce these vitamins into a skim milk product, and this method is used in compounding Carolene. The result is that Carolene contains more of vitamin A, and several times as much of vitamin D, as is found in evaporated milk; and more than twice as much of vitamin A, and several times as much vitamin D as is found in average whole cow's milk; and there is a constancy in its vitamin content not to be found in milk. Beyond that, it is a compound which, far from being injurious to health, is in fact one of the ten most nutritious food products known.

The learned District Court refused to receive or consider such evidence, his position on the trial (R. 135, 168-170) being substantially the same as that expressed in his opinion, *i.e.* (R. 51).

> "• • • I again agree with Judge Letts (see Carolene Products Co. v. Wallace, 27 Fed. Supp. 110) wherein he found as a fact that the plaintiff's products are wholesome. This defense, however, must be presented to Congress and not the Courts."

The same view was entertained by the learned Circuit Court of Appeals, which said (140 Fed. (2) 61, 64):

> "The fact that the inclusion of Carolene within the ambit of the statute leads to a seemingly harsh and inequitable result does not justify our giving to the statute the restrictive construction for which the defendants contend. This matter is one for the consideration of the Legislature and not the courts."

Specification of Assigned Errors Intended to be Urged.

The "Specification of Errors", as set forth in petitioners' brief in support of their application for a writ of certiorari, assigned five errors.

This court granted the writ, review to be limited to the first four errors so assigned. These four errors were set forth in the Specification as follows:

> "(1) The Circuit Court of Appeals erred in sustaining the ruling of the trial court, rejecting petitioners' offers of proof that Carolene is a wholesome and nutritious food product, fairly labeled and sold on its merits, without fraud on the public, and having none

of the nutritional deficiencies for which Congress banned the interstate shipment of 'filled milk';

(2) The Circuit Court of Appeals erred in holding that Carolene is within the purview of the Act, notwithstanding its nutritional value, its honest labeling and its sale without fraud on the public;

(3) The Circuit Court of Appeals erred in holding that Carolene is 'in imitation or semblance' of milk;

(4) The Circuit Court of Appeals erred in holding that the Act, as applied to Carolene, is constitutional."

These are the errors assigned and intended to be urged.

Summary of Argument.

1. Petitioners offered to show that the rationale of the Act was the banning of a skim milk compound deficient in vitamins A and D, and therefore injurious to public health; that Carolene is not such a compound, inasmuch as it is not deficient in vitamin A or D and is not injurious to public health; but, on the contrary, contains as much A, and more D, than whole cow's milk, is wholesome, non-injurious, and one of the ten most nutritious foods in the human diet.

Such evidence would show that Carolene is not within the rationale of the Act, and that the Act, if applied to Carolene, would be unconstitutional.

Proof of such facts would constitute a complete defense to the indictment, and petitioners contend that the learned Trial Court committed error highly prejudicial to them in refusing to receive or consider the evidence so offered.

2. Petitioners proved, and the Government made no effort to dispute, that whatever similarity exists between

Carolene and milk is due to the inherent quality of the indispensable ingredients of the product. Petitioners contend that such a similarity is not an "imitation or semblance" of milk within the meaning of the Act.

ARGUMENT

POINT I.

Petitioners offered to prove that at the time of the passage of the Act, "Filled Milk" was a skim milk compound devoid of vitamins A and D; that no way was then known of introducing these vitamins into Filled Milk, and that it was because of this vitamin deficiency that Congress declared that Filled Milk was injurious to health and proscribed its shipment. Petitioners offered to prove, further, that since the passage of the Act, science discovered a way to introduce vitamins A and D into a skim milk compound; that this discovery is employed in the compounding of Carolene, with the result that Carolene contains as much vitamin A and more vitamin D than whole cow's milk, and is one of the ten most wholesome and nutritious foods in the human diet.

Such facts, if established, would have constituted a complete defense to the indictment: they would have shown that Carolene is not within the rationale of the Act and that if applied to Carolene, the Act would be unconstitutional.

Petitioners were entitled to give such evidence, and the learned Court's refusal to receive or consider it constituted error highly prejudicial to petitioners.

The learned Courts below, though recognizing the harshness and the injustice of the result (R. 51 and 140 Fed. (2) 61, 64), proceeded on the theory that once it appeared that Carolene was within the strict letter of the Act, guilt fol-

lowed as a matter of law, even though Carolene was not within the spirit or the intent of the Act. In that, we submit, the learned Courts below were in error: a defendant charged with the violation of a statute may always show, as a defense, that the act charged, though within the strict letter, is not within the rationale of the statute, and in such event the statute does not apply.

A.

The evidence petitioners offered to introduce would have shown (1) that when Congress proscribed the shipment of "filled milk", the thing, and the only thing, it intended to proscribe was a skim milk compound, injurious to health because deficient in vitamins A and D; and (2) that Carolene is not such a compound; it is not deficient in vitamins A or D, and is not injurious to health, but, on the contrary, has these vitamins in as great, if not greater, a degree and with a constancy not found in milk, and is one of the most wholesome and nutritious food products known.

The Rationale of the Act.

The evidence petitioners offered to introduce would have shown that the term "filled milk", as used in the Act, was intended to describe a skimmed milk compound deficient in vitamins A and D, and for that reason injurious to public health.

A study of the hearings held by the Congressional Committees (Defts. Exs. 23B for id., and 26B for id.) reveals that it was the deficiency in vitamin A and vitamin D in filled milk, as it was constituted in 1923, that led to the passage of the Act.

The objection to "filled milk" was stated before the Committee on Agriculture of the House of Representatives by Prof. Hart, who said (Defts. Ex. 23B for id., R. 568):

"In other words, probably over 90 per cent of the fat soluble vitamine in whole milk has been removed in the skimming processes. This fact makes skimmed milk a poor source for the fat soluble vitamine.

* * * * *

These two facts—low content of fat soluble vitamine in the skimmed milk and the addition of an oil practically free from this nutritive factor—must make it clear that filled milk is no substitute for whole milk in the nutrition of infants or of children."

In a colloquy between Mr. Jackman and Dr. McCollum, in the hearings before the Senate Sub-Committee on Agriculture and Forestry, the Doctor stated (Defts. Ex. 26B for Id., R. 1092):

"Mr. Jackman: And the only difference then between the skimmed milk and the whole milk is that the skimmed milk does not contain as large a proportion of vitamine A as whole milk.

Dr. McCollum: With the possible qualification of the fourth vitamine.

Mr. Jackman: That is this so-called vitamine D?"

Prof. Mendel of Yale stated before the same Subcommittee (Defts. Ex. 26B for id., R. 1028):

"A mixture of skimmed milk and of most vegetable fats differ from whole milk in having a lower content of vitamine A than does fresh whole milk, because part of this vitamine is removed in the separated cream. According to the published studies of McCollum, of Baltimore, and Sherman, of New York, skimmed milk contains about one-half of the vitamine A. A filled milk of the sort indicated would, therefore, be essentially

identical with whole milk in respect to its energy content (calorie yield), proteins, fats, sugar and mineral nutrients, the most conspicuous difference being a lower content of vitamine A."

Referring to "filled milk", Dr. Goldberger, an outstanding scientist in the United States Public Health Service, told the same subcommittee (Defts. Ex. 26B for id., R. 1267):

"The reason, or probably the principal reason, why it would not serve exactly the same purpose as natural milk is that the first step of preparation of skimmed milk in removing the butter removes a certain food essential, named a vitamine, vitamine A, and the addition of the vegetable fat does not replace this element, although it replaces the fat and the caloric value; and secondly, food so constituted is, by comparison with an equivalent amount of milk, poorer in this dietary essential of vitamine A, and it is a dietary essential that is quite important; particularly important in young children and infants whose diet is naturally a restricted one and is likely to be restricted entirely to milk, and in such instances it would be necessary to add some other source of this vitamine in order to make the diet of a child complete. Without this other addition the nutrition of the child would be likely to suffer."

In the hearings before the House Committee, the following occurred in a colloquy between Mr. Kinchloe and Dr. Langworthy, of the Department of Agriculture (Defts. Ex. 23B for id., R. 519):

"Mr. Kinchloe: Of course, you agree that it (filled milk) is nutritious, but not as nutritious as pure milk?

Dr. Langworthy: It has not the nutritive value of whole milk because it lacks the vitamins."

Representative Voigt, the sponsor of the bill, stated in the House (Congressional Record, p. 7581, Ex. 25B for id., R. 605):

"The vitamines which have been found so necessary for the growth of infants and children and for the grown body as well are absent from this filled milk.

Mr. Dowell: It is not fair to put it in competition with pure milk, as to the nutritious qualities of it?

Mr. Voigt: Absolutely not. The vital, growth-producing, health-giving elements of milk known as the vitamines are almost wholly lacking in this substitute. Coconut oil contains no vitamines nor does any other vegetable oil."

Representative Williamson stated (Congressional Record, p. 7616, Ex. 25B for id., R. 726-727):

"The truth of the matter is and the evidence all shows that this product which is being sold as filled milk has the vitamines taken out of it, and that is the only essential element in milk that would be of any value so far as sustaining human life is concerned."

This A and D vitamin deficiency, as the hearings show, was then regarded as commercially irremediable. Thus, Dr. Gittings testified before the Senate Committee (Defts. Ex. 26B for id., R. 798) that vitamins A and D could be added only by the introduction of cod liver oil, and

"Of course, obviously, this cannot be considered as a substitute for food fat in a commercial sense. Unless cod-liver oil is added to other fats I know of no combination of fats which would equal in value butter fat.

Senator McKinley: Just as a matter of curiosity, I would like to know whether cod-liver oil could be substituted?

Doctor Gittings: Cod-liver oil can be substituted in minimum amounts mixed with other fats, but the cost of the product would be prohibitive.

Senator McKinley: I see.

Doctor Gittings: I said 'in a commercial sense'.

Senator McKinley: Yes."

See also to the same effect:

Hearings before the subcommittee of the Committee of the Agriculture and Forestry of the U. S. Senate, Defendants' Exhibit 26B for Identification; Prof. Summers, Head of the Children's Clinic, University of Maryland (R. 842); Dr. Henry J. Gerstenberger of Cleveland, Ohio (R. 879); Dr. Joseph Brennemann, Chief of the Medical Department of the Children's Memorial Hospital, Chicago, Ill. (R. 922-3, 932); Professor Casimir Funk of Columbia University (R. 986-990); Professor Steenbock of Wisconsin University (R. 1187).

Thus, the evidence offered by petitioners, if received, would have shown that "filled milk", as that term was used in 1923, denoted a skimmed milk and vegetable oil compound, inherently and irremediably deficient in, if not devoid of, vitamins A and D; that it was this vitamin deficiency which, in the opinion of Congress, rendered the product injurious to public health; and that such a product was the thing, and the only thing, which Congress had in mind, or intended to proscribe, in the adoption of the Act. That, as Mr. Justice (now Mr. Chief Justice) Stone said in *United States* v. *Carolene* (304 U. S. 144, 152) was

"* * * * the rationale of the legislation."

Carolene Is Not Within the Rationale of the Act.

Carolene is composed of pure, pasteurized skimmed milk, pure refined cottonseed oil or coconut oil, and vitamins A and D carried in a minute quantity of fish liver oil.

The evidence offered by petitioners as to the nutritive value of Carolene and its ingredients came from several experts, all outstanding in their fields (R. 130-1; 162-6; 182-7; 241), and so distinguished that in reference to one of them the learned Trial Judge remarked, and the Attorney General conceded (R. 132):

"He is one of the outstanding men in the country."

These experts testified that skimmed milk is the "most nutritive fraction of whole milk" (R. 159), wholesome "in every sense of the word", nutritious, and not injurious (R. 159-60, 191-2, 255) even to a child (R. 180).

It will be noted that neither the Act nor any other statute prohibits the sale of skim milk.

The second ingredient of Carolene is the vegetable oil, cottonseed or coconut.

There is no dispute about the fact that in Carolene "only absolutely pure oil is used" (R. 275); that the oil is a wholesome and nutritious food (R. 190), used in the human dietary to an extremely wide extent—about one and a half billion pounds per year (R. 274).

The third ingredient is the vitamin fortification element, i.e., vitamins A and D. Herein lies the fundamental difference between Carolene and "filled milk", as that term is used in the Act. "Filled milk" consisted of skim milk and a vegetable oil; it had no vitamins A or D, and no way was then known by which they could be added (R. 152, 246-7).

As the Government admitted in its brief in opposition to the application for the writ of certiorari (p. 8):

> "Congress was unaware, of course, that vitamins lost through removal of the butter fat from milk might conceivably be artificially replaced."

Their absence, in the opinion of Congress, rendered the compound injurious to health (*United States* v. *Carolene*, 304 U. S. 144, 152). Since then science has discovered a way in which it is commercially possible to add these vitamins to the compound (R. 153, 246-8). This is done in Carolene by introducing a "very high quality" fish liver oil containing vitamins A and D (R. 156), and distributing it evenly and permanently throughout the product by homogenization (R. 71, 218, 225). The oil is so highly concentrated that only a minute amount is necessary, and no fishy flavor or odor is created (R. 157).

The fortification of foods by the artificial introduction of vitamins is now common practice and universally recognized as a method of improving their nutritive value (R. 152, 153, 154, 246-7, 248). Evaporated milk is now fortified by that process* and this is also true even of whole milk.

Each of the ingredients of Carolene is wholesome, nourishing and not injurious to health (R. 156, 157, 159-160, 175-6, 177, 179-180, 189, 190, 212, 250-5, 274). None of these qualities is lost when the ingredients are combined; the combination—Carolene—is wholesome, nourishing and not injurious to health (R. 160-1, 175-6, 179-80, 212). It is more constant and of a superior quality to other feeding combinations (R. 177), and is "in every way fit for human consumption" (R. 155).

As a result of the vitamin fortification process employed in the compounding of Carolene, vitamins A and D are found in the product in greater and more constant quanti-

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*See the order of the Secretary of Agriculture, dated June 28, 1940, made pursuant to the provisions of the Federal Food, Drug and Cosmetic Act, acknowledging the need for, and the practice of, the fortification of evaporated milk by the application of radiant energy, or the addition of concentrate vitamin D dissolved in a food oil. The Secretary's order fixes the technique, and the standards, and the text of labeling, for such fortification processes. See finding 13, and §18.520, sub-paragraph 2 of the order, copies of which have been filed with the Clerk of the Court.

ties than they exist in whole milk (R. 147, 148, 152, 155, 157, 177, 207-9, 257-8). This results from two circumstances; first, the extremely high variation in which A is found in cow's milk, and second, the minute quantity of D which is found in the best quality cow's milk.

Vitamin A is not made in the body of the cow; it appears in her milk only from the greens she eats (R. 206). Consequently, the A content of a cow's milk in the winter months, when she does not feed on greens (R. 205-9, 246), is a tiny fraction—between 1/400 and 1/300—of the amount found in her summer milk (R. 206). The vitamin D content of whole milk is so insignificant at all times, summer as well as winter, that milk producers are now "irradiating" it, *i.e.*, fortifying it by the artificial introduction of vitamin D (R. 206, 248).

In Carolene the A and D content is more constant (R. 147, 148, 155, 157, 177, 257-8). A single can of Carolene contains at least 2,000 units of vitamin A—*more than is in an equal amount of winter cow's milk and at least as much as the average of winter and summer* (R. 207-8) and 400 units of D—*more than in an equal quantity of the best summer cow's milk* (R. 147-8, 155, 157, 257-8). As compared with evaporated milk, the balance in favor of Carolene is even greater (R. 207-9).

Inasmuch as the right to ship Carolene seems, though we think without justification, to have been measured by its nutritional value as compared with milk, it is not inappropriate to point out that, like every other food, cow's milk is not self-sufficient; no amount of it alone will supply all the nutritional factors required in the human diet (R. 198, 203-4); it must be modified and supplemented by other things to compensate for its deficiencies (R. 172). Moreover, the milk fat in cow's milk produces greater irritation than oil in the intestines of children (R. 172, 177, 178).

In 1940 certain charts (Defts. Exs. 12 and 13, R. 298, 307) were published, showing the relative values of various foods (R. 261). These charts were prepared by Dr. Robert S. Harris, associate professor of Nutritional Biochemistry at M. I. T. (R. 241), and approved by the American Medical Association (R. 260). They were revised by Dr. Harris within a few months prior to the trial of this case (R. 267). These charts show (Defts. Exs. 12 and 13) that "The essentials of an Adequate Diet" are measured in terms of protein, calories, minerals and vitamins (R. 306), and that in these essentials, milk and Carolene stand in the following order, by comparison with other foods:

Essentials of an Adequate Diet (R. 308-312)	*Milk*	*Carolene* (*Milnot*)
Protein	14th	11th
Calories	9th	10th
Minerals		
Calcium	2nd	1st
Phosphorus	11th	10th
Iron and Copper	22nd	18th

It will be observed that Carolene ranks higher than whole milk in protein, calcium, phosphorus, iron and copper, and is virtually on a par in calories.

Insofar as vitamins A and D are concerned, Defendants' Exhibit 13 shows (R. 313), in terms of units in a single portion:

	Milk	*Carolene* (*Milnot*)
Vitamin A	218	482-576
Vitamin D	4	96-116

Professor Harris interpreted the charts and pointed out that they showed (R. 267-8) that Carolene

"• • • ranks among our best foods with respect to calorie, protein, calcium and vitamin content, and, in my opinion, is within the first ten, and I think there is very little to challenge such a statement. Therefore, I don't understand why such a fine food should ever be conceived as being barred from use by the American People."

The determinative fact in this case is that Congress banned "filled milk" because of the nutritive qualities it *lacked*, and Carolene does *not* lack them. Congress did not ban "filled milk" because it contained skimmed milk or because it contained a vegetable oil; Congress banned "filled milk" because it did *not* contain vitamins A and D. Consequently, the question whether or not the Act was intended to apply to a product like Carolene must be determined, not by whether or not it contains skimmed milk or vegetable oil, but by *whether or not it contains vitamins A and D, in significant quantities.* If the evidence offered by petitioners had been received, the answer to this question could not be in dispute: that evidence would have shown that Carolene contains vitamins A and D to a degree not only equal to that in which they are found in whole milk, but in even a greater degree. This, we submit, would have made it perfectly clear that the Act was not intended to apply to such a product as Carolene.

All the foregoing evidence concerning the nature and quality of Carolene, and the fundamental difference between it and "filled milk", as that term was used in the Act, was rejected by the learned Trial Court on the ground that petitioners were asking the Court "to take the place of an Act of Congress" (R. 135), and the rejection was approved by the learned Circuit Court of Appeals, on the ground that inasmuch as Carolene falls within the strict letter of the statute, *i.e.* skimmed milk compounded with a fat or oil

other than milk fat, it is immaterial whether Carolene is wholesome and nutritious, or harmful and injurious, and that it is likewise immaterial that the ingredients whose absence in "filled milk" caused Congress to prohibit its shipment, are not absent in Carolene: These matters, said the learned Court below (140 Fed. [2] 61, 64) raise questions

> "for the consideration of the legislature and not the courts."

That ruling, as we show below, was erroneous and highly prejudicial to petitioners and requires a reversal of the judgment.

B.

The spirit and intent of a statute, not its strict letter, govern the applicability of the statute to any given state of facts. It was, therefore, error for the learned Trial Court to refuse to receive the evidence offered by petitioners.

It is a cardinal rule in construing and applying statutes that an act which is not within the spirit and intent of the statute is not covered by it, even though such act be within the letter of the statute.

Church of the Holy Trinity v. *U. S.*, 143 U. S. 457, 12 S. Ct. 511, 36 L. Ed. 226;

U. S. v. *Aetna Explosives Co.*, 256 U. S. 402, 41 S. Ct. 513, 65 L. Ed. 1013;

Ozawa v. *U. S.*, 260 U. S. 178, 43 S. Ct. 65, 67 L. Ed. 199;

U. S. v. *Carolene Products Co.*, 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234;

U. S. v. *Kirby*, 7 Wall. 482, 19 L. Ed. 278;
In re Di Torio, 8 Fed. (2) 279;
Carolene Products Co. v. *Mahoney, et al.*, 294 F. 902, affd. 2 F. (2) 366;
Delany v. *Moraitis*, 136 F. (2) 129.

In the *Church of the Holy Trinity* case (143 U. S. 457), a leading case on this proposition, the Court said at page 459:

"* * * It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has often been asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. * * *"

In the *Di Torio* case [8 Fed. (2d) 279], the rule is stated as follows, at page 280:

"The spirit or reason of the law is the life of the law, and will prevail over the letter. The meaning of general terms may be restrained by the spirit or reason of the law and general language may be construed to admit implied exceptions. A thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of the makers.

The rule applicable in such cases, as the Court said in *U. S. v. Kirby*, 7 Wall. 482, 19 L. Ed. 278, 280, is:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

The foregoing principle was recognized in *Carolene Products Co. v. Mahoney, et al.*, 294 F. 902, affirmed 2 F. (2) 366 (C. C. A. 1st Cir.). In that case, the predecessor Carolene corporation was granted an injunction against the application of the Massachusetts "filled milk" statute to a product consisting of skimmed milk and egg yolk fat. The Court held that the product was within the literal wording of the Act; it went on to say, however (p. 903):

> "It is inconceivable that the Massachusetts Legislature intended any such wholesale condemnation of desirable and widely used food products. Of course, the act is a criminal act, and must be strictly construed. It is unfortunate that the responsibility of initial construction falls on a federal court; but, on the whole, I am inclined to the view that the plaintiff's first contention, that Carolene is not covered by the act, falls under the principle, of which the decision of the Supreme Court in the Holy Trinity Church case, 143 U. S. 457, 459, Sup. Ct. 511, 512, 36 L. Ed. 226, is the strongest illustration:
>
> 'A thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers.'"

The learned District Judge was of the opinion (R. 41) that the principle of the foregoing cases may not be applied in a prosecution under the Act, because of the decision of this Court in *United States* v. *Carolene Products Co.*, 304 U. S. 144, and with this view the learned Court below agreed (140 Fed. [2] 61, 65).

That case, we submit, is not authority for the Court's conclusion; indeed, it is to the contrary.

United States v. *Carolene* arose under an indictment which charged that the product there involved—the former, unfortified product—was (p. 146) an "adulterated article of food, injurious to the public health". The defendant demurred, thereby admitting the charge. Consequently, as this Court pointed out (304 U. S. at p. 154), the only question presented was whether or not Congress had power to pass a law banning the shipment of an "adulterated article of food, injurious to the public health".

In answering that question in the affirmative, this Court did not hold that a defendant, indicted under the Act, could not show that what he shipped was not "filled milk", as that term was intended to be understood in the Act. On the contrary, Mr. Justice (now Mr. Chief Justice) Stone said (p. 152):

> "* * * the statutory characterization of filled milk as injurious to health and as a fraud upon the public";

should be deemed a declaration which reveals

> "the rationale of the legislation",

and (p. 153);

> "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts

beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry. *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, *and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.*" (Italics ours.)

In *Borden's Farm Products* v. *Baldwin*, 293 U. S. 194, 55 S. Ct. 187, 79 L. Ed. 281, referred to by the present Chief Justice in the text quoted above, this Court said at page 210:

"But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support."

That is precisely what petitioners sought to do: they offered to prove that the rationale of the Act was the vitamin deficiency which rendered "filled milk" injurious to public health, and which, in 1923, was deemed irremediable; that this deficiency does not exist in Carolene, and that Carolene is one of the most wholesome and nutritious of foods.

A defendant charged with violation of the Act is entitled to show this difference, because even though the Act was

valid as applied to "filled milk", as that product was constituted at the time the Act was adopted, it would not be valid as applied to a subsequently discovered product, free from the defects which constituted the evil that justified the passage of the Act.

Nashville etc. Ry. v. *Walters*, 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949;
Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239;
Abie State Bank v. *Bryan*, 282 U. S. 765, 51 S. Ct. 252, 75 L. Ed. 690;
Weaver v. *Palmer*, 270 U. S. 402, 46 S. Ct. 320, 70 L. Ed. 654;
Pennsylvania R. R. Co. v. *Driscoll, et al.*, 330 Penn. 97;
Chastleton Corp. v. *Sinclair*, 264 U. S. 543, 44 S. Ct. 405, 68 L. Ed. 841.

Nashville etc. Ry. v. *Walters*, 294 U. S. 405, involved the constitutionality of an order of the State Highway Commission, based on specific statutory authorization, imposing on a railroad one-half of the cost of eliminating a grade crossing.

Mr. Justice Brandeis said (p. 414):

"The Supreme Court (of Tennessee) declined to consider the special facts relied upon as showing that the order, and the statute as applied, were arbitrary and unreasonable; and did not pass upon the question whether the evidence sustained those findings. It held that the statute was, upon its face, constitutional; that when it was passed the state had, in the exercise of its police power, authority to impose upon railroads, one-half of the cost of eliminating existing or future grade crossings; and that the court could not 'any more' con-

sider 'whether the provisions of the act in question have been rendered burdensome or unreasonable by changed economic and transportation conditions,' than it 'could consider changed mental attitudes to determine the constitutionality or enforceability of a statute.' A rule to the contrary is settled by the decisions of this Court. A statute valid as to one set of facts may be invalid as to another (citing cases)."

In *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, the Court, in holding a state statute unconstitutional, said (p. 289):

"* * * That the statute was not claimed to be invalid *in toto* and for every purpose does not matter. A statute may be invalid as applied to one state of facts and yet valid as applied to another."

A succinct statement of the rule appears in *Pennsylvania R.R. Co.* v. *Driscoll, et al.*, 330 Penn. 97 (1938) at page 108:

"Furthermore, the record shows that conditions upon which the act must operate have changed since 1911. It is well settled that, where a law depends upon the existence of a certain set of facts to uphold it, if the facts change, then, though valid when passed, it may be invalid under the altered facts and circumstances. Chastleton Corp. v. Sinclair, supra; Newton v. Consolidated Gas Co., Nashville C. & St. L. Ry. v. Walter, supra. Where there has been such a change in relevant conditions, and a statute is challenged on the ground of its constitutionality as applied to the new facts, evidence must be admitted to sustain the challenge."

In *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543, at page 547 the Court said:

> "We repeat what was stated in Block v. Hirsh, 256 U. S. 135, 154, as to the respect due to a declaration of this kind by the legislature so far as it relates to present facts. But, even as to them a court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. 256 U. S. 154. Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 536. And still more obviously, so far as this declaration looks to the future, it can be no more than prophecy, and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed. Perrin v. United States, 232 U. S. 478, 486, 487; Missouri v. Chicago, B. & Q. R. Co., 241 U. S. 533, 539, 540. In Newtown v. Consolidated Gas Co., 258 U. S. 165, a statutory rate that had been sustained for earlier years in Willcox v. Consolidated Gas Co., 212 U. S. 19, was held confiscatory for 1918 and 1919."

As stated by Mr. Chief Justice Hughes in *Abie State Bank* v. *Bryan*, 282 U. S. 765, that (p. 772):

> "* * * a police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation."

Filled milk, as known in 1923, was, as Congress declared, injurious to public health, and therefore its sale a fraud on the public. That was the rationale of the Act (*United States* v. *Carolene*, 304 U. S. 144, 152), and if true, a sufficient basis to sustain its constitutionality. Under the

cases to which we have referred, the Act, even though constitutional as to "filled milk" as constituted at the time of the adoption of the Act, would be unconstitutional as to a product not within its rationale.

It was, accordingly, competent for defendants to show, as they offered to show, that the present product is not within the rationale of the Act; that, unlike the product known as filled milk in 1923, Carolene is a wholesome, nutritious product containing all and more of the vitamins, the absence of which in "filled milk" was the reason for the passage of the Act prohibiting its shipment.

The statement in the opinion of the learned court below (140 Fed. [2] 61, 65) that an "impressive array of courts" has refused to accept petitioners' contentions, invites a word of comment. The cases referred to by the Circuit Court of Appeals are

U. S. v. Carolene Products Co., 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234;

U. S. v. Carolene Products Co., 104 F. (2d) 969;

Hebe v. Shaw, 248 U. S. 297, 39 S. Ct. 125, 63 L. Ed. 255;

Carolene Products Co. v. Evaporated Milk Assn., 93 F. (2d) 202;

Carolene Products Co. v. Wallace, 27 F. Supp. 110, affd. 307 U. S. 612;

Setzer v. Mayo, 150 Fla. 734;

Kansas ex rel. Mitchell v. Sage Stores Co., 157 Kansas 404.

The first four of these cases dealt with the vitamin-deficient product known as "filled milk" at the time of the adoption of the Act. They do not touch the question now presented.

Carolene v. Wallace (27 F. Supp. 110, affd. 307 U. S.

612) was an application for a preliminary injunction against threatened criminal proceedings. The Court pointed out that criminal proceedings will not be enjoined unless an immediate, great and irreparable loss is threatened, and held that these conditions precedent had not been shown to exist. But the Court did not stop there; *it pointedly indicated* (27 Fed. Supp. at p. 113) *that the remedy lay in setting up the nutritious and wholesome nature of the product as a defense in the criminal proceeding, if one should be instituted.* Subsequently, an application for a permanent injunction was made before the same court (30 F. Supp. 266). Again the court held, for the same reasons as those previously stated, that the facts alleged, even if proved, would not justify an injunction against criminal prosecution. Again, however, the court said (p. 268):

> "The plaintiff has an opportunity to present its contentions and its proposed evidence upon the matters specified in the criminal prosecution now pending."

In *Setzer* v. *Mayo*, 150 Fla. 734, 9 So. (2) 280, the petitioners there brought certiorari to review orders of the Florida Circuit Court striking out answers of the defendants in a proceeding to prohibit the sale of petitioner's product under the Florida filled milk statute.

By a vote of four to three, the Supreme Court of Florida held the statute constitutional on its face. However, the majority said (p. 282) that:

> "* * * while we uphold the validity of the Act, we are conscious of the rule that a valid statute may be assailed by proof of facts showing that as applied to a particular article, it is without support in reason because the article, although within the proscribed class, is so different from others in the same class as to be without the reason for the prohibition, the effect of the proof depending on the circumstances of the case."

At page 283 the Court said:

> "* * * Well recognized food concepts of yesterday are being discarded because of scientific discovery. If therefore relators can show that notwithstanding their product is produced by substituting cotton seed oil or some other substitute for butter fat and vitamins it is wholesome and nutritious and that it is equal to or superior to whole milk as a food, the test prescribed in the last two cited cases is met and their product relieved from condemnation by the Act."

Thus, it will be observed, that although the majority of the Court in the *Setzer* case sustained the Florida act as constitutional on its face, they recognized the very principle which, in the present case, the Courts below have refused to apply.

The minority in the *Florida* case differed from the majority only in this: the majority held that under *U. S. v. Carolene*, 304 U. S. 144 and *Carolene v. Wallace*, 27 Fed. Supp. 110, affd. 307 U. S. 612, the statute would be unconstitutional as to the product only if the proof should show that the oil substituted for butter fat is as rich or richer in vitamins than butter fat (p. 282)—which the proof here offered would have done—whereas in the opinion of the minority the statute was unconstitutional as applied to any product which was wholesome and nutritious, and as to whose contents the public was not misled (p. 284).

Kansas ex rel. Mitchell v. Sage Stores Co., 157 Kan. 404, the last of the cases in which, according to the learned Court below, courts have refused to accept petitioners' contentions, was decided in October 1943, by a vote of four to three, and is now here for review, pursuant to a writ of certiorari granted by this Court (321 U. S. 762, Memoranda, April 10, 1944). That case is no authority for the proposition that petitioners were not entitled to introduce evi

dence to show that Carolene is a wholesome and nutritious product, not within the rationale of the Act. Quite the contrary, the *Kansas* case distinctly recognizes the right to introduce such evidence. That right was exercised in the *Kansas* case and hundreds of pages of testimony on these subjects were received by the Court.

Thus the cases relied on below, where they are not inapplicable, distinctly recognize and approve the principle on which petitioners rely.

The learned Court below admitted that its conclusion is at variance with that in *Mahoney* v. *Carolene Products Co.*, 2 F. (2d) 366. That, however, is not the only case which is contra: others are:

People v. *Carolene Products Co.*, 345 Ill. 166;
Carolene Products Co. v. *McLaughlin*, 365 Ill. 62;
Carolene Products Co. v. *Thomson*, 276 Mich. 172;
Carolene Products Co, v. *Banning*, 131 Nebr. 429;
State ex rel. McKittrick v. *Carolene Products Co.*, 346 Mo. 1049.

In the first four of these cases state Filled Milk Acts were declared unconstitutional. In the last one the Missouri Filled Milk Act, which is similar to the Federal Act, was held inapplicable to Carolene.

The authorities to which we have referred, we respectfully submit, establish that a person charged with violation of a statute has a right to show that even though the act with which he is charged is within the strict letter of the statute, it is not covered by the statute because it is not within the spirit and intent of the statute.

We submit, with great respect, that the learned Courts below erred in refusing to give effect to that rule by refusing to receive the evidence offered by petitioners.

POINT II.

Since Carolene is a wholesome and beneficial food product, fairly labeled and sold on its merits, without fraud on the public, and having none of the nutritional deficiencies for which Congress prohibited the interstate shipment of "Filled Milk", the legislative prohibition, if held applicable to Carolene, would be unconstitutional.

The evidence offered by petitioners, if received, would have shown that Carolene is a highly nutritious and wholesome product—one of the ten best in the human dietary—fairly labeled, and sold on its merits without fraud on the public.

To prohibit completely the sale of such a product, merely because of similarity to another product in looks and taste would be arbitrary and confiscatory. Thus in *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 46 S. Ct. 320, 70 L. Ed. 654, the Court said:

> "'Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way.' Quong Wing v. Kirkendall, supra, 64. * * * Here, it is established that sterilization eliminates the dangers, if any, from the use of shoddy. As against that fact, the provision in question cannot be sustained as a measure to protect health. * * *
>
> "Nor can such prohibition be sustained as a measure to prevent deception. In order to ascertain whether the materials used and the finished article conform to its requirements, the Act expressly provides for inspection of the places where such articles are made, sold or kept for sale. * * * Obviously these regulations

or others that are adequate may be effectively applied to shoddy-filled articles" (pp. 414-415).

"* * * The business here involved is legitimate and useful; and while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment. Adams v. Tanner, 244 U. S. 590, 596; Meyer v. Nebraska, 262 U. S. 390; Burns Baking Co. v. Bryan, 264 U. S. 504" (p. 415).

The same rule was enunciated in the concurring opinion of Mr. Justice Butler in *U. S.* v. *Carolene*, 304 U. S. 144, wherein he said (p. 155):

"If construed to exclude from interstate commerce wholesome food products that demonstrably are neither injurious to health nor calculated to deceive, they (statutes) are repugnant to the Fifth Amendment."

and in support of that statement were cited cases in Illinois, Michigan and Nebraska where filled milk acts have been held unconstitutional on that ground.

The Court below referred to *Hebe* v. *Shaw*, 248 U. S. 297, 39 Sup. Ct. 125, 63 L. Ed. 255. The *Hebe* case was decided by a divided court, three justices dissenting, and is clearly distinguishable from the case at bar. The *Hebe* case dealt with a statute of Ohio which made it a criminal offense to sell condensed milk made of milk from which the cream had been removed. Such a product was, by the terms of another Ohio statute to which the Court there referred (248 U. S. at pp. 302-3), condemned as an "adulterated" product, and, in the light of scientific knowledge at that time, the nutritional deficiencies caused by the removal of the cream were irremediable. Even though the resultant product was assumed to be wholesome and nutritive, it did not have, and, as far as was then known, could not be

endowed with certain essential nutrients which were carried off with the cream, and the product would, necessarily, be an "inferior product". So the Court described it in the *Hebe* case (248 U. S., at p. 302). What was there decided, as this Court subsequently pointed out (*U. S. v. Carolene*, 304 U. S. 144), was that the legislature had power (p. 148)

> "to secure a minimum of particular nutritive elements in a widely used article of food and to protect the public from fraudulent substitutions * * *."

The *Hebe* case does not justify a construction of the filled milk statute which would proscribe petitioner's product; it does not warrant a judicial determination that petitioners are precluded from proving that their product is not within the rationale of the Filled Milk Statute.

The learned Circuit Court of Appeals held (140 Fed. (2) 61, 65) that the legislative power extends to the banning of an "innocent article" which falls within a prohibited class, citing *Carolene Products Co. v. Hanrahan*, 164 S. W. (2nd) 597 (Ky. 1941). That case arose on a demurrer in an action by *Carolene* for a declaration of rights and injunctive relief against threatened prosecutions by local authorities under the Kentucky Filled Milk Law. The Kentucky court held that the question of constitutionality was foreclosed by the "controlling" decision of this Court in *United States v. Carolene*, 304 U. S. 144—the Kentucky Court ignoring completely the fact that *United States v. Carolene* involved the product as compounded prior to the discovery of the vitamin-fortification process, and came up on a demurrer by which the defendant there had admitted that the product involved was an "adulterated article of food injurious to the public health".

The Circuit Court of Appeals also said (140 F. (2) 61, 65) that Congress may bar goods which "may be the subject

of a fraudulent sale", although the goods themselves may not be injurious, citing *Seven Cases of Eckman's Alterative* v. *U. S.*, 239 U. S. 510, 36 S. Ct. 190, 60 L. Ed. 411. In the first place, the Government made no attempt to prove that Carolene is the subject of fraudulent sale, and there is no evidence to that effect in the record. Moreover, the case referred to does not sustain the proposition for which the learned Circuit Court of Appeals cited it; indeed, it had nothing to do with that proposition. The only question there involved, and the only point there decided, was that where a shipper of bottles containing what purports to be medicine, inserts in each package a circular reading "We know it has cured and that it has and will cure Tuberculosis," that shipper was guilty of misbranding in violation of Section 8 of the Food & Drugs Act. It is a far cry from that case to this one. That case involved no question of the right to prohibit the shipment of a nutritious product, sold under honest labels, and without fraud. Such a product, we submit, may not be banned (*Weaver* v. *Palmer*, 270 U. S. 402, *supra*, p. 30).

Skimmed milk, which forms the base of Carolene, is a wholesome and nutritious product and even the Act does not prohibit its sale. Cottonseed oil, the second ingredient, is a wholesome and nutritious product, and there is no prohibition against its sale. Vitamins A and D, the remaining ingredients of Carolene, are wholesome and nutritious, and there is no law prohibiting their sale. None of the virtues of these constituents is sacrificed when they are combined, and the resultant product, Carolene, is wholesome and nutritious. Therefore, if the Act were held to apply to Carolene, we would have the anomalous situation that, although each of the ingredients is wholesome and nutritious, and may be freely dealt in, the combination, which is also wholesome and nutritious, may not. We know of no case which supports so inconsistent a result.

POINT III.

Carolene is not within the Act unless it is "in imitation or semblance" of milk. The learned District Judge erred in holding that Carolene is "in * * * semblance" of milk merely because "it reacts to the human senses as milk would react".

The Act adopted verbatim the words "in imitation or semblance" from earlier State and Federal Statutes which had previously been construed by the courts. By these decisions it had been settled that a product is "in imitation or semblance" of another only if ingredients have been added to, or omitted from, the product for the purpose of making it simulate such other. In adopting the language of the earlier statutes, Congress must be deemed to have used the language in the sense in which the courts had previously construed it.

It is undisputed here that whatever resemblance exists between Carolene and milk is due to the inherent qualities and attributes of the necessary ingredients of the product, and not to the addition or omission of any ingredient for the purpose of bringing about a simulation.

Consequently Carolene is not "in imitation or semblance" of milk, and the Act does not apply to it.

The Act does not proscribe all products compounded of skimmed milk and fats other than milk fats. The "prohibition of the statute", as Mr. Justice (now Mr. Chief Justice) Stone said in *U. S. v. Carolene Products Co.*, 304 U. S. 144, 151.

> "is inoperative unless the product is 'in imitation or semblance of milk, cream or skimmed milk * * * '".

The learned District Judge held that this requirement had been met because Carolene (R. 45)

"reacts to the human senses as milk would react."

In this we submit the learned District Judge erred.

Prior to the passage of the Act, the New York State Agricultural Law (§64 *) defined filled milk as the Federal statute now does, including the words "in imitation or semblance" of milk.

By another section of the same statute (present §59), it was made a violation of law to sell or offer for sale any commodity "in imitation or semblance" of butter.

The meaning and intent of the words "in imitation or semblance" in both sections of the same statute, each section dealing with a food product, are obviously identical, and although their meaning in §64 had not been construed prior to the passage of the Act, their meaning in §59 frequently had been.

In *People* v. *Simpson, Crawford Co.* (1909), 62 N. Y. Misc. 240, affd. 133 N. Y. App. Div. 889, defendants had been convicted of selling a product "in imitation or semblance" of natural butter. In reversing the conviction, the Court said at page 242:

> "The statutory prohibition is aimed at a designed and intentional imitation of dairy butter, in manufacturing and selling the oleomargarine, and not at a resemblance in qualities inherent in the articles themselves and common to both. People v. Arensberg, 105 N. Y. 123. If the oleomargarine sold by the defendants in these three actions was, by artificial means, not essential or incident to the manufacture of the article, but resorted to for the mere purpose of imitation, made to resemble dairy butter, then those judgments must be affirmed. It appears in all three cases that the oleo-

* For New York Statutes see Supplement, pp. 46-50 of this Brief.

margarine resembled butter in taste and smell, but there is nothing to show that these qualities of taste and smell are not inherent in both articles, or common to both, without any resort to artificial means."

In *People* v. *Guiton* (1913) 210 N. Y. 1, another case involving the interpretation of the term "in imitation or semblance" in the Agricultural Law, the Court said at page 8:

> "It was not intended to and it does not prohibit in oleomargarine the semblance in color to butter, which results, not from imitation, but from a selection of ingredients disassociated with the design or intention to produce it. It does not compel the makers of oleomargarine to consciously choose the ingredients having a shade of color which will not produce that of butter."

People v. *Schintzius* (1908), 61 N. Y. Misc. 410, was a motion by the People to enjoin the sale of a product claimed to be "in imitation or semblance" of natural butter and therefore proscribed by the Agricultural Law. The Court said at page 416:

> "There is no affidavit that oleomargarine looks or should look any different from the article sold by the defendant. There is no proof that the product sold by the defendant was not the natural result of the inherent qualities of the constituent parts which entered into its manufacture. There is no proof that any foreign or artificial product was added to give the article sold the appearance of dairy butter. There is an entire absence of any evidence of an attempt to deceive the buyer or the public by a simulation of butter. * * *."
>
> "In view of these facts the People have failed to make out a case for the issuing of an injunction."

See also:

People v. *Meyer*, 44 App. Div. 1 (1899);
People ex rel. McCauley v. *Wahle*, 124 App. Div. 762 (1908).

Congress was not unaware of the interpretation which the New York courts had placed upon the words "imitation or semblance" in the New York Statute. In the hearings before the sub-committee of the Senate Committee on Agriculture and Forestry, specific reference was made to the *Guiton* case, from which we have just quoted (*supra*, p. 36) and to *People* v. *Marx*, 99 N. Y. 377. It was pointed out (Defts. Ex. 26B for id., R. 1173) that in those cases

> "it was decided that the words 'imitation or semblance' used in connection with a law which prohibits the sale and manufacture of oleomargarine meant a conscious, designed and intentional imitation. In other words, it meant the incorporation in the product of an ingredient placed there solely for the purpose of causing it to resemble the real article."

It would seem only reasonable to assume that if Congress intended the words "in imitation or semblance", as used in the Act, to have a different connotation, it would have used some phrase other than "imitation or semblance" or else it would have coupled it with language which would make it clear that a different construction was intended.

It is also highly significant that Congress, in considering the enactment of federal filled milk legislation, had before it the statutes of eleven states on that subject (Defts. Ex. 26B for id., R. 1240-1244). Eight of them contained no reference to "imitation or semblance"; two (California and Utah, printed in Supplement, p. 31) were regulatory statutes containing these words, but expressly including the phrase

"whether by intent of the compounder or other person, or by reason of the appearance or other characteristic of the mixture or compound."

Only the New York statute used the words "in imitation or semblance", without more (Hearings before Senate Subcommittee, Defts. Ex. 26 for id., R. 1241; Report of Senate Committee, Defts. Ex. 27 for id., R. 1309). Of all the patterns so before it, Congress adopted the wording of the New York statute, and defined filled milk as a product (Act, §61) "in imitation or semblance" of milk. It is hardly conceivable that in so carefully selecting the New York, rather than some other state, statute as the prototype of the federal one, Congress contemplated that the language would be given an interpretation different from the one the New York courts had given it.

In such circumstances, the applicable rule of construction is as stated by Circuit Judge Parker in *Newton* v. *Employers Liability Assurance Corp. Ltd.* (C. C. A. 4th Circuit 1939), 107 Fed. (2d) 164, 167 (cert. den. 309 U. S. 673), to wit:

"It is to be noted that this provision of the statute was taken verbatim from a similar statute of the State of New York. The decisions of the Court of Appeals of New York construing it, therefore, would seem to be more than persuasive and to become authoritative under the rule that a statute adopted from another state will be presumed to have been adopted with the construction placed upon it by the courts of that state. *James* v. *Appel*, 192 U. S. 129, 135."

See also:

U. S. v. *Lacato*, 29 Fed. (2d) [illegible].

The Act was passed after the Federal Oleomargarine Tax Statute [Act Cong. Aug. 2, 1886, c. 840; 24 Stat. 209].

The words "in imitation or semblance" in the Federal Oleomargarine statute had already been construed as referring to a product "made in the conscious imitation of butter". Thus, in *Braun & Fitts* v. *Coyne* (D. C. Ill. 1899), 125 Fed. 331, the Court said at page 332:

> "The purpose of Congress was to protect butter as it has commonly been known against outside competitors, under the guise or appearance of butter. The test is this: Is the product a conscious imitation of butter?"

The words, "imitation or semblance" having previously been construed in the Federal Oleomargarine statute, Congress is deemed, in using the same words in the later Act, particularly since both deal with the sale of food products, to have intended that these words in the later statute should be construed as they had been in the earlier one.

Davis v. *Pringle* (C. C. A. 4th Cir.) 1 Fed. (2d) 860, affd. 268 U. S. 315;
Thorn v. *Browne* (C. C. A. 8th Cir.) 257 Fed. 519, cert. den. 250 U. S. 645;
Bennett v. *Langworthy* (C. C. A. 8th Cir.) 49 Fed. (2d) 574, 576;
U. S. v. *Merrium*, 263 U. S. 179, 187, 44 S. Ct. 69, 68 L. Ed. 40.

In view of the interpretation which has been put upon the words "in imitation or semblance" in the statutes from which Congress borrowed these words in enacting the Filled Milk Act, it would seem clear that they mean a designed and intentional addition or omission of ingredients for the purpose of creating a product which bears similarity to milk; not a fortuitous resemblance due to the inherent qualities of the indispensable ingredients of the product.

There is no claim that in the production of Carolene anything is put into it, or kept out of it, to disguise it in any

way; its color, odor, texture and appearance are due solely to the nature and quality of the necessary ingredients of the product (R. 80-82).

The product is sold in 14 1/2 ounce cans—a standard can for liquid products (R. 78; 99). This type of can is used not only for evaporated whole milk, as the Government would have the Court believe, but also, as shown in defendant's proffer, by other products, among which are buttermilk, goat's milk, skimmed milk and a product for making an ice cream known as "Frizz" (Defts. Exs. 14, '15, 16, 17 and 18 for id.).

Carolene is put up in cans bearing labels which boldly and plainly state in large type that the product contained therein is "not evaporated milk or cream", and that the ingredients are evaporated skimmed milk, cottonseed or coconut oil and vitamins A and D in fish liver oil. (Govt. Exs. 26-32).

As the learned District Judge pointed out in his opinion,

> "There is no contention by the Government that the defendant's labels violate any act of Congress or regulation passed thereunder * * *" (R. 41).

Thus, it is clear—indeed it cannot be disputed—that Carolene is a compound in which no ingredient has been added, or taken away, for the purpose of disguising the product, or of producing a compound which simulates milk; and that the resemblance is due solely to the nature and attributes of the necessary ingredients of the product; and further, that it is marketed without fraud on the public, under labels which accurately and plainly describe it. Such a product is not "in imitation or semblance" of milk within the meaning of the Act, and, consequently, the learned Courts below erred in holding that it is.

CONCLUSION.

If the judgment appealed from is permitted to stand, a great injustice will be done these defendants. Petitioners Hauser and Hartke have been branded as criminals and sentenced to substantial prison terms; all petitioners have been fined, and all because, forsooth, a highly nutritious product has been held to fall within the strict letter of a statute passed twenty years ago, when this product was unknown, to reach an entirely different, and deleterious, compound.

Where, as here, the question of guilt depends upon the interpretation of a statute, and violation, if any there was, was in good faith and in the belief that the statute did not apply, it cannot be too strongly emphasized that criminal statutes must be strictly construed, and that guilt may be found only after it has been established beyond a reasonable doubt.

It is unnecessary to discuss here whether or not, as certain members of Congress charged when the bill was under debate, the Filled Milk Act is legislation to protect not the public, but the profits of the dairy interests.* Whether or not that was the purpose and object of the legislation, the fact remains that it can be justified only to the extent that it is designed to prohibit the introduction into interstate commerce of an article of food which is not merely a combination of skimmed milk and fats other than butter fats, but, in addition, is an "adulterated article of food" which is an "imitation or semblance" of milk and is "injurious to the public health". True, the last clause is not, by the Act, made an integral part of the definition, but it is, as the

* Defendants' Exhibit 24 for Identification (R. 599) and Defendants' Exhibit 25 for Identification, pages 7581, *et seq.* (R. 605, *et seq.*). See also minority opinion in *Kansas, etc. v. Sage Stores*, 157 Kan. 404.

present Chief Justice said, the "rationale" of the only basis and the only justification for the Act.

The defendants' product is not "in imitation or semblance" of milk, as that phrase had been construed by both State and Federal Courts at the time Congress incorporated it into this Act. With the "filled milk" statutes of eleven different states before it, Congress selected as the prototype of the Federal Act the phraseology found in the New York Statute. It should be evident from this, we submit, that Congress must have intended the words "in imitation or semblance" to be interpreted as the New York courts had interpreted them. No one can, or does, dispute that the New York courts had interpreted these words to mean a similarity artificially created by the introduction or omission of ingredients for the purpose of bringing about a simulation, and that they did not mean a similarity resulting, as it does in Carolene, from the natural qualities and attributes of the necessary ingredients of the product. A similar construction had been put on the same words as used in the Federal Oleomargarine Act.

Quite apart from the fact that Carolene is not in "imitation or semblance" of milk, is the fact that it is, qualitatively, not a product of the kind which Congress intended to proscribe by the Act. The Congressional debates are clear on this point. They show that in 1923 there was a wide traffic in a product then called "filled milk", which, though it looked, smelled and tasted like milk, was deficient in the nutritive vitamins found in milk; that it was, in fact, a product injurious to public health, and that the sale of such a product, under such circumstances, was a fraud upon the public. This is the evil which Congress set out to cure and the Act which it passed was, of course, directed to that evil. In the light of scientific information then extant, there was no way in which these vitamins could

be introduced into the product then known as filled milk. Hence we find Congress, in general terms, proscribing filled milk under a definition which referred merely to its then known constituents.

What was believed impossible in 1923 has since been found to be entirely possible. Science has found a way to take the product which was known as filled milk in 1923 and introduce vitamins A and D into it in quantities even greater than these vitamins are found in whole milk. The result is that there can now be produced a product such as Carolene, which, though it is a compound of skimmed milk and fat other than a milk fat, nevertheless has all the nutritive qualities of whole milk, and more.

In 1923 such a product was not only unknown, but its manufacture was not believed possible. A law passed in a state of scientific ignorance should not blanket an era of discovery.

The Circuit Court of Appeals stated frankly in its opinion (140 F. (2) 61, 64) that

> "* * * the inclusion of Carolene within the ambit of the statute leads to a seemingly harsh and inequitable result * * *"

It is difficult to understand why the court felt powerless to prevent such an injustice. The Circuit Court recognized that the result is "harsh and inequitable" only because it recognized that the Act was intended to operate upon, and may justly be applied to, a skimmed milk compound deficient in vitamins A and D, and therefore injurious to health; whereas Carolene is not deficient in these vitamins, is not injurious to health, but is, on the contrary, one of the most wholesome and nutritious of foods. In such circumstances, the Court should have received the evidence offered by petitioners, which would have shown that Carolene is

> "* * * not within the statute, because not within its spirit nor within the intention of its makers",

and thereby prevented the "harsh and inequitable" result. This would not have been judicial legislation; it would merely have given effect to the well established rule that courts will not interpret a statute so as to apply it to a situation to which Congress did not intend it to apply. (*Church of the Holy Trinity* v. *U. S.*, 143 U. S. 457; *U. S.* v. *Kirby*, 7 Wall. 482; *Delany* v. *Moraitis*, 136 F. (2) 129.)

A product injurious to health, the sale of which is a fraud on the public, may constitutionally be proscribed, and the Act is constitutional only to the extent that it is applied to such a product. The defendants offered to prove, and for the purposes of this appeal it must be taken as true, that by virtue of the scientific advance which has been made in this field since the Act was passed, it is now possible to produce a vitamin fortified skimmed milk—vegetable oil compound which is not injurious to public health, which contains all the nutritive elements which Congress sought to insure, and whose sale is not a fraud upon the public; that Carolene is such a compound; that Carolene is a highly nutritious food product, manufactured under the most modern and sanitary conditions and sold in containers bearing labels which plainly and prominently state precisely what the ingredients are and that the product is not milk or evaporated milk. Such a product is not an "adulterated" food product; it is not "injurious to public health", and the sale of it is not a "fraud on the public". To extend the application of the Act to such a product would be unconstitutional, because such a product is not within the rationale of the Act.

The judgment appealed from should be reversed, and the defendants and each of them acquitted; or, in the alternative, the judgment should be reversed and the case remanded to the Trial Court, with instructions that the Court admit the proof offered by defendants.

SAMUEL H. KAUFMAN,
Attorney for Petitioners.

SAMUEL H. KAUFMAN,
CRAMPTON HARRIS,
GEORGE TROSK,
Of Counsel.

SUPPLEMENT.

Statutes Relied On.

LAWS OF NEW YORK, 1922.

§64. *Regulations in regard to skimmed milk and products other than cheese manufactured therefrom.* 1. * * *

2. * * *

3. No person shall manufacture, sell or exchange, offer or expose for sale or exchange, or have in his possession with the intent to sell or exchange any condensed, evaporated, concentrated, powdered, dried or desiccated milk, cream or skimmed milk to which there has been added, or with which there has been mixed, blended or compounded, any fats or oils, other than milk fat, so that the finished product shall be in imitation or semblance of condensed, evaporated, concentrated, powdered, dried or desiccated milk.

LAWS OF NEW YORK, 1893.

CHAPTER 338, SECTION 26.

Manufacture and sale of imitation butter prohibited. No person by himself, his agents or employes, shall produce or manufacture out of, or from any animal fats or animal or vegetable oils not produced from unadulterated milk or cream from the same, the article known as oleomargarine or any article or product in imitation or semblance of natural butter produced from pure, unadulterated milk or cream of the same; or mix, compound with or add to milk, cream or butter any acids,

or other deleterious substance or any animal fats or animal or vegetable oils not produced from milk or cream, so as to produce any article or substance or any human food in imitation or in the semblance of natural butter nor sell, keep for sale or offer for sale any article, substance, or compound made, manufactured or produced in violation of the provisions of this section, whether such article, substance or compound shall be made or produced in this state or elsewhere.

LAWS OF NEW YORK, 1894.

CHAPTER 426, SECTION 26.

Manufacture and sale of imitation butter prohibited. No person, by himself, his agents or employes, shall produce or manufacture out of or from any animal fats or animal or vegetable oils not produced from unadulterated milk, or cream from the same, any article or product in imitation or semblance of natural butter produced from pure, unadulterated milk or cream of the same; nor shall any person solicit or take orders for the same, or offer the same for sale, or mix, compound with or add to milk, cream or butter any acids or other deleterious substance, or any animal fats or animal or vegetable oils not produced from milk or cream, so as to produce any article or substance or any human food in imitation or in the semblance of natural butter, nor sell, keep for sale, or offer for sale any article, substance or compound made, manufactured or produced in violation of the provisions of this section, whether such article, substance or compound shall be made or produced in this state or elsewhere.

Supplement

LAWS OF NEW YORK, 1897.

CHAPTER 768, SECTION 26.

Same as Laws of New York, 1893, Chapter 338, Section 26 (*supra*), with the addition of the following sentence:

"Any dealer in any article or product, the manufacture or sale of which is prohibited by this act, who shall keep, store or display such article or product, with other merchandise or stock in his place of business, shall be deemed to have the same in his possession for sale."

LAWS OF NEW YORK, 1902.

CHAPTER 385, SECTION 26.

Same as Laws of New York, 1897, Chapter 768, Section 26, *supra*, with the insertion before the last sentence thereof of the following:

Any person manufacturing, selling, offering or exposing for sale any commodity or substance in imitation or semblance of butter the product of the dairy, shall be deemed guilty of a violation of the agricultural law, whether he sells such commodity or substance as butter, oleomargarine or under any other name or designation whatsoever and irrespective of any representations he may make relative to such commodity or substance.

LAWS OF NEW YORK, 1909.

CHAPTER 9, SECTION 28.

Codification under the title "Agricultural Law" same as Law of 1902, Chapter 385, Section 26, *supra*.

LAWS OF NEW YORK, 1922.

CHAPTER 368, SECTION 59.

Manufacture and sale of imitation butter prohibited. No person by himself, his agents or employees, shall produce or manufacture out of or from any animal fats or animal or vegetable oils not produced from unadulterated milk or cream from the same, oleomargarine in imitation or semblance of natural butter produced from pure, unadulterated milk or cream of the same; or mix, compound with or add to milk, cream or butter any acids or other deleterious substance or any animal fats or animal or vegetable oils not produced from milk or cream, so as to produce any article or substance or any human food in imitation or in semblance of natural butter, nor sell, keep for sale or offer for sale any article, substance or compound, made, manufactured, or produced in violation of the provisions of this section, whether such article, substance or compound shall be made or produced in this state or elsewhere. Any person manufacturing, selling, offering or exposing for sale any commodity or substance in imitation or semblance of butter, the product of the dairy, shall be deemed guilty of a violation of this chapter, whether he sells such commodity or substance as butter, oleomargarine or under any other name or designation what-

soever and irrespective of any representations he may make relative to such commodity or substance. Any dealer in any article or product, the manufacture or sale of which is prohibited by this section, who shall keep, store or display such article or product, with other merchandise or stock in his place of business, shall be deemed to have the same in his possession for sale.

NEW YORK AGRICULTURE AND MARKETS LAW

(Present Law).

SECTION 59.

Same as Laws of 1922, Chapter 368, Section 59, *supra*, with the addition of the following sentence:

Within the meaning of the provisions of this article, oleomargarine or any similar substance shall be deemed conclusively to be in imitation or semblance of butter, when it has a yellow color similar to the color of butter; and such similarity shall be deemed to exist whenever the oleomargarine or similar substance has a tint or shade containing more than one and six tenths degrees of yellow, or of yellow and red collectively, but with an excess of yellow over red, measured in the terms of the Lovibond tintometer scale or its equivalent.

CALIFORNIA STATUTES, 1919.

CHAPTER 59, PAGE 89.

SECTION 1. For the purposes of this act certain manufactured substances, certain mixtures and compounds shall be known and designated as "imitation milk," namely: (a) any mixture or compound composed of skim milk or condensed, evaporated or powdered skim milk and any edible oil or fat other than natural milk fat, whether with or without any other ingredient or ingredients; (b) any mixture or compound made in imitation or semblance, or having the appearance or semblance, of milk or condensed or evaporated milk, or when so made or having such appearance or semblance calculated or intended, whether by intent of the compounder or other person, or by reason of the appearance or other characteristic of the mixture or compound, for use or disposition as or for milk, or as or for condensed or evaporated milk, or to induce its purchase, or use as or for milk or condensed or evaporated milk.

LAWS OF UTAH, 1921.

CHAPTER 45, PAGE 119.

Same as California Statutes, 1919, Chapter 59, page 89, *supra*, except that the comma after the word "compound" in line 16 is changed to a semi-colon and the comma after the word "milk" in line 17 is omitted.